323 U.S. #1
GRA-HAR
(1)

FILED
MAR 4 1944
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 758

GRAND RIVER DAM AUTHORITY, A PUBLIC CORPORATION,

Petitioner,

vs.

THE BOARD OF EDUCATION OF THE TOWN OF WYANDOTTE, OKLAHOMA, INDEPENDENT SCHOOL DISTRICT No. 1.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OKLAHOMA AND BRIEF IN SUPPORT THEREOF.

EDWARD P. MARSHALL,
ROBERT L. DAVIDSON,
JESSE L. BALLARD,
Counsel for Petitioner.

INDEX.

Subject Index.

	Page
Petition for writ of certiorari	1
Summary statement of the matter involved	2
Statement of points relied on by petitioner	5
Grounds for believing that the questions presented are substantial and that the writ prayed for should be granted	9
Brief in support of petition	11
Opinion of the court below	11
Jurisdiction	11
Statement of the case	12
Specification of errors	12
Summary of argument	13
Argument	17
Proposition I	17
II	21
III	23
IV	28
V	30
Conclusion	33

Table of Cases Cited.

Alabama Power Co. v. *Smith*, 229 Ala. 105, 155 S. 601	14, 17, 20, 28, 31
Arizona v. *California*, 283 U. S. 423, 75 L. Ed. 1154	16, 24
Bedford v. *United States*, 192 U. S. 217	32
Blanset v. *Cardin*, 256 U. S. 319, 65 L. Ed. 950	19
Broad River Power Co. v. *Query*, 288 U. S. 178, 77 L. Ed. 685	28
Chattanooga & Tennessee Power Co. v. *Lawson*, 139 Tenn. 354, 201 S. W. 165	14, 20
Corrigan Transportation Co. v. *Sanitary District*, 125 Fed. 611, 137 Fed. 851	17, 31
Cunningham v. *Neagle*, 135 U. S. 1, 34 L. Ed. 55	16, 24
Den v. *Hoboken Land & Improvement Co.*, 18 How. 272, 15 L. Ed. 372	14, 19

143953

Page

Erskine v. *Holnback*, 14 Wall. 613, 20 L. Ed. 745 . . . . 15, 20
Evans v. *Massman Construction Co.*, 243 Mo. 632, 1?2 S. W. (2d) 924 . . . . 14, 20, 30
Grand River Dam Authority v. *Going*, 29 Fed. Supp. 316 . . . . 15, 18, 22
Habana, The 189, U. S. 453, 47 L. Ed. 900 . . . . 14, 19, 23
Haffin v. *Mason*, 15 Wall. 671, 21 L. Ed. 196 . . . . 15, 20
Harding v. *Woodcock*, 137 U. S. 43, 34 L. Ed. 580 . . . . 15, 20
Henry Ford & Son, Inc. v. *Litle Falls Fibre Co.*, 280 U. S. 369, 74 L. Ed. 483 . . . . 10, 27
Humpich's Trustees v. *Louisville Gas & Electric Co.*, 269 Ky. 558, 108 S. W. (2d) 509 . . . . 14, 17, 19, 31
Hunt v. *United States*, 278 U. S. 96, 73 L. Ed. 200 . . . . 16, 24
James v. *Dravo Contracting Co.*, 302 U. S. 1?4, 82 L. Ed. 155 . . . . 16, 25
James Stewart & Co. v. *Sadrakula*, 309 U. S. 94, 84 L. Ed. 596 24
Johnson v. *State of Maryland*, 254 U. S. 51, 65 L. Ed. 126 . . . . 16, 24
Lamar v. *Browne*, 92 U. S. 137, 23 L. Ed. 650 . . . . 14, 19
Louisville Hydro-Electric Co. v. *Coburn*, 270 Ky. 631, 110 S. W. (2d) 445 . . . . 17, 31
Matthews v. *Densmore*, 109 U. S. 216, 27 L. Ed. 912 . . . . 15, 20
Moore Ice Cream Co. v. *Rose*, 289 U. S. 373, 77 L. Ed. 1265 . . . . 15, 20
Nelson v. *McKenzie-Hague Co.*, 192 Minn. 180, 256 N. W. 96 . . . . 16, 17, 30
Nofire v. *United States*, 164 U. S. 657, 41 L. Ed. 588 19
Oklahoma, ex rel. Phillips, v. *Atkinson Co.*, 313 U. S. 508, 85 L. Ed. 1487 . . . . 5, 13, 18
Ohio v. *Thomas*, 173 U. S. 276, 43 L. Ed. 699 . . . . 16, 24
Osborne v. *Bank of the United States*, 9 Wheat. 738, 6 L. Ed. 204 . . . . 16, 26
Ross v. *Stewart*, 227 U. S. 530, 57 L. Ed. 626 19
Southern Railway Co. v. *Reed*, 222 U. S. 424, 56 L. Ed. 257 27
Stutsman County v. *Wallace*, 142 U. S. 293, 35 L. Ed. 1018 . . . . 15, 20
Tennessee v. *Davis*, 100 U. S. 257, 25 L. Ed. 648 . . . . 16, 24
United States v. *Elliott*, 131 F. (2d) 720 18

Page

United States v. *Lynah*, 188 U. S. 445, 47 L. Ed. 539 ..... 9, 14, 19, 28
Wickham v. *Grand River Dam Authority*, 189 Okla. 540, 118 P. (2d) 640 22
Yearsley v. *W. A. Ross Construction Co.*, 309 U. S. 18, 84 L. Ed. 554 ..... 9, 10, 14, 17, 19, 30, 32

STATUTES CITED.

Act of June 22, 1936, c. 688, Sec. 1, 49 Stat. 1570; Title 33, Sec. 701a, U. S. C. 5
Act of June 22, 1936, c. 688, Sec. 2, 49 Stat. 1570; Title 33, Sec. 701b, U. S. C. 6, 13, 18
Act of June 28, 1938, c. 795, Sec. 5, 52 Stat. 1223; Title 33, Sec. 701b-2, U. S. C. 6, 13, 18, 21
Constitution of the United States, Article I, Section 8 ..... 5, 8, 13
Federal Power Act:
Sec. 6, 16 U. S. C. 799 7
Sec. 10a, 16 U. S. C. 803a 7
Sec. 10c, 16 U. S. C. 802c 9
Sec. 10g, 16 U. S. C. 802g 7
Sec. 16 .....
Sec. 18, 16 U. S. C. 811 7
Sec. 23, 16 U. S. C. 817 ..... 15, 22
Sec. 26, 16 U. S. C. 820 ..... 16, 27
Judicial Code, Sec. 237c as amended 11
Tit. 82, Chapt. 8, O. S. 1941 ..... 3, 22
Title 82, Sec. 861, O. S. 1941 ..... 8, 11
Title 82, Sec. 862, O. S. 1941 ..... 15, 23, 24
Title 82, Sec. 862n, O. S. 1941 ..... 15, 22
Title 83, Sec. 862, O. S. 1941 .....

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 758

GRAND RIVER DAM AUTHORITY, A PUBLIC CORPORATION,

Petitioner,

vs.

THE BOARD OF EDUCATION OF THE TOWN OF WYANDOTTE, OKLAHOMA, INDEPENDENT SCHOOL DISTRICT No. 1.

PETITION FOR A WRIT OF CERTIORARI REQUIRING THE SUPREME COURT OF THE STATE OF OKLAHOMA TO CERTIFY TO THE SUPREME COURT OF THE UNITED STATES, FOR ITS REVIEW AND DETERMINATION, THE CASE OF GRAND RIVER DAM AUTHORITY, PLAINTIFF IN ERROR, VERSUS THE BOARD OF EDUCATION OF THE TOWN OF WYANDOTTE, OKLAHOMA, INDEPENDENT SCHOOL DISTRICT No. 1, DEFENDANT IN ERROR.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

I.

Summary Statement of the Matter Involved.

This is a special proceeding under the statutes of Oklahoma instituted by respondent against petitioner in the District Court of Ottawa County, Oklahoma, in which damages were assessed against petitioner because of injuries to the basement of respondent's school building caused by the percolation of waters from petitioner's dual-purpose water power and flood control reservoir on Grand River, in Oklahoma, while said reservoir was being operated for flood control under the direction of the District Engineer, Corps of Engineers, as the authorized representative of the Secretary of War. By its petition for the appointment of appraisers to assess the damages claimed, respondent asserted that petitioner had acquired lands in the reservoir area up to elevation 750 above mean sea level, but during flood stages on the Neosho and Spring rivers, which converge to form the Grand River in the neighborhood of respondent's property, petitioner had permitted the waters of the reservoir to rise above that elevation (R. 3). To the appraisers' report, petitioner excepted, alleging the issuance, and its acceptance of, a license from the Federal Power Commission to construct and operate its dam and reservoir; the provisions of said license reserving the storage space in said reservoir above elevation 745 for the control of floods and vesting in the Secretary of War the power to control operation of the reservoir above that elevation; that at the time complained of the operation of the reservoir was directed by the District Engineer, as the authorized representative of the Secretary of War; and that such acts as were performed by petitioner's employees in response to the directions of the District Engineer were performed by them as agents of the United States, for which petitioner was not liable (R. 14-17).

Respondent responded to this plea, saying that by storing water to elevation 749.7 at petitioner's dam, the latter knew that a resultant "back-water curve" would result near respondent's property to approximately elevation 752 and that, thereby, lands not acquired by petitioner would be flooded, and asked that the damages be assessed as previously prayed (R. 42-43).

The District Court overruled petitioner's exceptions and rendered judgment (R. 95). The Supreme Court of Oklahoma affirmed (R. 124-130).

The facts are not disputed. Petitioner is a public corporation and State agency, created by the Laws of Oklahoma (Tit. 82, Chapt. 8, O. S. 1941). At the time complained of, the District Engineer had instructed petitioner's hydraulic engineer to hold the water level to elevation 749.7 at the dam gauge (R. 109). Petitioner's hydraulic engineer protested directing attention to the probable back-water curve and consequent overflow above elevation 750 in the upper reaches of the reservoir area, but was told to proceed according to instructions (R. 124). While a part of respondent's school grounds was overflowed, the water which worked the injury here complained of percolated into the basement and well through a loose sub-surface formation (R. 50-51, 57, 78), so that whether or not petitioner had acquired lands or flowage rights up to the surface elevation which the waters reached at Wyandotte the injuries complained of would have resulted. The District Engineer's instructions were implicity followed (R. 84, 85, 124).

Those parts of petitioner's Federal Power license which reserve storage space in the reservoir above elevation 745 exclusively for flood control and give to the Secretary of War, or his authorized representative, control of the

operation of the reservoir above that elevation for that purpose are:

> "Article 12. The Licensee shall acquire all necessary lands, easements, and rights-of-way up to elevation 750; and, without regard to the provisions of Article 13, below, shall raise all railroads affected by the project to such elevation above elevation 755 as may be necessary to provide for operation of the railroads when the reservoir is raised to elevation 755.
>
> "Article 13. The Licensee is hereby authorized to operate the reservoir in such manner as to utilize storage space below elevation 745 for power production purposes but not to utilize any storage space above said elevation 745 for power production purposes except during periods when the reservoir is being operated for the control of floods. The storage capacity between elevations 745 and 755 shall be expressly reserved for the control of floods. The Licensee shall impound flood waters in the storage space between elevation 745 and 755, and release flood waters therefrom, when, as, and in the manner directed by the Secretary of War, or his authorized representative; provided, that the Licensee shall not be required to impound any water above elevation 750 until the United States has acquired the necessary flowage rights above that elevation.
>
> "Article 14. Subject to the provisions of Article 13, the operation of the project by the Licensee, so far as such operation may affect the use, storage, and discharge from storage, of waters, shall at all times be subject to the control of the Secretary of War under such rules and regulations as he may prescribe in the interests of navigation and flood control, and subject to the control of the Commission under such rules and regulations as it may prescribe for the safety of the demand for the protection of life, health, and property." (R. 37).

The District Engineer interpreted petitioner's license to require the impounding of waters to elevation 750 at the

dam gauge, as shown by various telegraphic instructions to that effect (R. 106, 109).

The Federal Power Commission concurred, saying:

> "The Authority is under obligation to provide flood water storage up to elevation 750 at the dam pursuant to the directions of the Corps of Engineers" (R. 100).

II

Statement of Points Relied On By Petitioner.

1. Power to legislate for the control of floods on non-navigable tributaries of navigable waters of the United States is within the scope of Congress' authority under Article I, Section 8, of the Constitution of the United States (*Oklahoma, ex rel. Phillips, v. Guy F. Atkinson Co.*, 313 U. S. 508, 525, 85 L. Ed. 1487, 1500) and, by appropriate measures, Congress has placed the management of flood control in the War Department, under the direction of the Secretary of War. The Federal Power Commission was authorized to include among the conditions of petitioner's Federal Power license, Articles 12, 13 and 14, thereof, and the District Engineer, being designated as the authorized representative of the Secretary of War, by the latter, was authorized to direct operation of petitioner's reservoir above elevation 745. In obeying the District Engineer's directions in operating said reservoir for flood control above that elevation, petitioner and its employees acted as agents of the United States and cannot be held to liability for having carried out those directions.

By the Act of June 22, 1936, c. 688, Sec. 1, 49 Stat. 1570; Tit. 33, Sec. 701a, U. S. C., it is provided in part:

> " * * * flood control on navigable waters or their tributaries is a proper activity of the Federal Government in cooperation with the States, their political subdivisions and localities thereof," etc.

"* * * that investigations and improvements of rivers and other waterways, including watersheds thereof, for flood control purposes are in the interest of the general welfare," etc.

"* * * that the Federal Government should improve or participate in the improvement of navigable waters or their tributaries, including watersheds thereof, for flood-control purposes if the benefits of whomsoever they may accrue are in excess of the estimated costs, and if the lives and social security of the people are otherwise adversely affected."

By the same Act (Sec. 2, 49 Stat. 1570; Tit. 33, Sec. 701b, U. S. C.) jurisdiction of control of floods was vested in the War Department, as follows:

"Federal investigations and improvements of rivers and other waterways for flood control and allied purposes shall be under the jurisdiction of and shall be prosecuted by the War Department under the direction of the Secretary of War and supervision of the Chief of Engineers," etc.

The Act of June 28, 1938, c. 795, Sec. 5, 52 Stat. 1223; Tit. 33, Sec. 701b-2, U. S. C., provided:

"In carrying out the purposes of the Act of June 22, 1936 (49 Stat. 1570), as amended and supplemented, the Secretary of War and the Secretary of Agriculture are hereby authorized to cooperate with institutions, organizations, and individuals, and to utilize the services of Federal, State, and other public agencies," etc.

The Federal Power Commission was authorized to include in petitioner's license Articles 12, 13 and 14 thereof by the following provisions of the Federal Power Act:

"* * * Each such license shall be conditioned upon acceptance by the licensee of all the terms and conditions of this chapter and such further conditions, if any, as the Commission shall prescribe in conformity

with this chapter, which said terms and conditions and the acceptance thereof shall be expressed in the license. (Act June 10, 1920, c. 285, Sec. 6, 41 Stat. 1067; Act of Aug. 26, 1935, c. 687, Tit. II, Sec. 204, 49 Stat. 841; Tit. 16, Sec. 799 U. S. C.)

"That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial public uses, including recreational purposes;" etc. (Act June 10, 1920, c. 285, Sec. 10a, 41 Stat. 1068; Act Aug. 26, 1935, c. 687, Tit. II, Sec. 206g, 49 Stat. 842; Tit. 16, Sec. 803a, U. S. C.)

"The operation of any navigation facilities which may be constructed as a part of or in connection with any dam or diversion structure built under the provisions of this chapter, whether at the expense of a licensee hereunder or by the United States, shall at all times be controlled by such reasonable rules and regulations in the interest of navigation, including the control of the level of the pool caused by such dam or diversion structure as may be made by the Secretary of War," etc. (Act June 10, 1920, c. 285, Sec. 18, 41 Stat. 1073; Act August 26, 1935, c. 687, Tit. II, Sec. 209, 49 Stat. 845; Tit. 16, Sec. 811, U. S. C.)"

The Federal Power Commission was further authorized to include in the license:

"Such other conditions not inconsistent with the provisions of this Act as the Commission may require." (Act June 10, 1920, c. 285, Sec. 10g; 41 Stat. 1068; Act Aug. 26, 1935, c. 687, Tit. II, Sec. 206g, 49 Stat. 842; Tit. 16, Sec. 802g, U. S. C.)"

2. The Supreme Court of Oklahoma denied petitioner a right and immunity specially set up under the Constitution and laws of the United States and an authority exercised

thereunder in holding it liable for damages to respondent's property for having accepted the conditions of the Federal Power license regarding flood control operations and in having built the dam authorized thereby.

3. The Supreme Court of Oklahoma erroneously held that the Act of the Legislature of Oklahoma creating the petitioner, as an agency of the State (Tit. 82, Sec. 861, O. S. 1941), imposed a liability upon petitioner for the injury to respondent directly resulting from petitioner's obedience to the directions of the District Engineer in controlling floods when the reservoir reached a stage above elevation 745, under the authority and requirements of petitioner's Federal Power license, contrary to the laws of the United States enacted pursuant to Article I, Section 8, of the Constitution of the United States.

The part of the State Act involved is:

> "Provided said District shall be liable for all damage caused by said District, its agents, servants and employees in creating, constructing, maintaining or operating said District to any corporation, partnership, person or individual whose property, either real or personal, within or without said District, has been damaged and said damages may be determined by appropriate action in the same manner as provided by law under the Conservancy Act of the State of Oklahoma."

4. The Supreme Court of Oklahoma erroneously denied an immunity vouchsafed to petitioner under the Constitution and Laws of the United States specially claimed in holding that by complying with the conditions of its Federal Power license, it committed a wrong for which it was liable to respondent.

5. Neither Section 10c of the Federal Power Act (Act June 10, 1920, c. 285, Sec. 10c, 41 Stat. 1068; Act Aug. 26,

1935, c. 687, Tit. II, Sec. 206, 49 Stat. 842; Tit. 16, Sec. 802c, U. S. C.) nor Article 17 of the petitioner's license, requiring petitioner to discharge all liability for damages resulting from the operation of the project, created a liability in petitioner for damages caused by its operation of the reservoir for flood control purposes under the direction of the District Engineer.

III.

Grounds for Believing That the Questions Presented Are Substantial and That the Writ Prayed for Should Be Granted.

1. The decision of the Supreme Court of Oklahoma is opposed to the decisions of the Supreme Court of the United States in *United States* v. *Lynah*, 188 U. S. 445, 47 L. Ed. 539; *Yearsley* v. *W. A. Ross Construction Co.*, 309 U. S. 18, 84 L. Ed. 554, and cases therein cited, and to the decisions of the Supreme Courts of Kentucky, Tennessee and Missouri upon the subject of petitioner's immunity from liability herein as an agency of the United States.

2. The development of flood control means, in conjunction with water-power projects, having become a policy of the National Government, and operations for the control of floods being most logically subject to management and coordination by the War Department, the builders of such projects should know definitely the extent of their personal responsibility in accepting licenses providing for the control of floods under the exclusive direction of the Secretary of War and whether in carrying out that direction they are to be held liable for consequential injuries to the lands of others.

3. The questions presented bear importantly upon the future operation of petitioner's project as regards rate structure for electric energy, for if it is responsible in dam-

ages resulting from flood control operations, under competent Federal authority, appropriate reserves must be created to liquidate potential liabilities arising from this source.

4. It is believed that these questions are substantial and ought to be considered for the reasons which impelled the granting of writs of certiorari in *Henry Ford & Son, Inc.* v. *Little Falls Fibre Co.*, 280 U. S. 369, 374, 74 L. Ed. 483, 487, and *Yearsley* v. *Ross Construction Co.*, 309 U. S. 18, 20, 84 L. Ed. 554, 556.

Wherefore, your petitioner respectfully prays that a writ of certiorari issue to the Supreme Court of the State of Oklahoma charging said court to certify and send this Court a full and complete transcript of the record and all proceedings of said Supreme Court of the State of Oklahoma had in the case numbered and entitled on its docket, No. 31,226, Grand River Dam Authority, a public corporation, plaintiff in error, *versus* The Board of Education of the Town of Wyandotte, Oklahoma, Independent School District No. 1, defendant in error, to the end that this case may be reviewed and determined by this Court as provided for by the statutes of the United States, and that the judgment of said Supreme Court of the State of Oklahoma be reversed by this Court, and for such relief as to this Court may seem proper.

Copies of the transcript of record in this case in the Supreme Court of the State of Oklahoma are filed herewith in conformity with Rule No. 38 of this Honorable Court.

EDWARD P. MARSHALL,
ROBERT L. DAVIDSON,
JESSE L. BALLARD,
Attorneys for Petitioner,
Kennedy Building,
Tulsa, Oklahoma.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Opinion of the Court Below.

The opinion of the Supreme Court of Oklahoma has not been officially reported. It was filed December 21, 1943 (R. 124-130). No petition for rehearing was filed.

II.

Jurisdiction.

1. The ground on which the jurisdiction of the Supreme Court of the United States is invoked is that provided by Section 237c of the Judicial Code, as amended by Act of January 31, 1928, c. 14, Sec. 1, (45 Stat. 54); Tit. 28, Sec. 344b, U. S. C., providing for the issuance of a writ of certiorari by the Supreme Court of the United States to review a final judgment rendered by the highest court of the state where an immunity is specially set up and claimed under the Constitution and statutes of the United States.

2. That there is drawn into question the validity of a statute of the State of Oklahoma, to-wit, that part of Tit. 82, Sec. 861, O. S. 1941, set forth in the opinion of the Supreme Court of the State of Oklahoma (R. 127) as imposing upon petitioner the liability adjudged against it in this cause contrary to the immunity from such liability as established under the Constitution and laws of the United States by decisions of this Court.

3. The authority of the District Engineer to direct the acts of petitioner claimed to have resulted in the liability adjudged by the Supreme Court of the State of Oklahoma flows from the Commerce Clause of the Constitution of

the United States. Provisions of the Flood Control Acts set forth in the "Statement of Points Relied on by Petitioner," stated in the petition, the Federal license issued to petitioner by the Federal Power Commission, and the acts performed by petitioner thereunder constituted a performance by it of a Federal function, because of which its liability, if any, should be determined by the Constitution and laws of the United States and the decisions of this Court.

4. The provisions of the Federal Power Act and the provisions of petitioner's license do not operate to destroy the immunity from liability claimed by petitioner.

III.

Statement of Case.

The nature of the case, the manner in which the Federal question was raised, and the pertinent facts are set forth in the "Summary Statement of the Matter Involved" appearing in the petition, and are adopted by reference as a part of this brief.

IV.

Specification of Errors.

1. The Supreme Court of Oklahoma erred in refusing to hold that petitioner, as an instrumentality of the Government of the United States in the acts complained of, is immune from liability to respondent.

2. The Supreme Court of Oklahoma erred in holding that by the acceptance of its Federal Power license, conditioned as it was regarding flood control operations and the building of petitioner's dam, constituted a wrong for which petitioner is liable to respondent.

3. The Supreme Court of Oklahoma erred in holding that petitioner was liable under the provisions of Tit. 83, Sec. 862, O. S. 1941, notwithstanding that at the time complained of the petitioner was engaged in performing acts directed by the District Engineer for the control of floods.

4. The Supreme Court of Oklahoma erroneously decided that in complying with the provisions of its Federal Power license regarding the control of floods under the direction of the District Engineer petitioner committed the wrong complained of.

5. The Supreme Court of Oklahoma erred in affirming the judgment complained of, for petitioner's immunity from liability was specially set up and sufficed to show that the judgment complained of was erroneous.

Summary of Argument.

1. The power of Congress to provide for the control of floods on non-navigable tributaries of navigable waters of the United States springs from Article 1, Sec. 8, of the Constitution of the United States. *Oklahoma, ex rel. Phillips,* v. *Guy F. Atkinson Co.*, 313 U. S. 508, 525, 85 L. Ed. 1487, 1500. Jurisdiction to direct Federal activities in the control of floods on navigable streams and their tributaries is conferred upon the Secretary of War by the Act of June 22, 1936, c. 688, Sec. 2, 49 Stat. 1570; Tit. 33, Sec. 701b U. S. C. The Secretary of War was authorized to utilize the services of petitioner as a public agency under the provisions of the Act of June 28, 1938, c. 795, Sec. 5, 52 Stat. 1223; Tit. 33, Sec. 701b-2, U. S. C., as follows:

> "In carrying out the purposes of the Act of June 22, 1936 (49 Stat. 1570), as amended and supplemented, the Secretary of War and the Secretary of Agriculture are hereby authorized to cooperate with institutions, organizations, and individuals, and to

utilize the services of Federal, State, and other public agencies," etc.

By Article 13 (R. 37) of petitioner's Federal Power license the space in petitioner's reservoir above elevation 745 was reserved expressly for the control of floods, and direction of the operation of the flood control pool was vested in the Secretary of War or his authorized representative. Authority to condition the license in this manner was possessed by the Federal Power Commission under the provisions of the Federal Power Act, particularly set out in the "Statement of Points Relied Upon by Petitioner" in the petition. In complying with the directions of the District Engineer in holding the waters of the reservoir to elevation 749.7 at the dam gauge petitioner acted as the agent of the United States and cannot be held liable for the consequences of obedience to these authorized directions. *Yearsley* v. *W. A. Ross Construction Co.*, 309 U. S. 18, 21, 84 L. Ed. 554, 556; *United States* v. *Lynah*, 188 U. S. 445, 465, 47 L. Ed. 539, 541; *Den* v. *Hoboken Land & Improvement Co.*, 18 How. (U. S.) 272, 283, 15 L. Ed. 372, 377; *Lamar* v. *Browne*, 92 U. S. 137, 199, 23 L. Ed. 650, 655; *The Habana*, 189 U. S. 453, 465, 47 L. Ed. 901, 903; *Humpich's Trustees* v. *Louisville Gas & Electric Co.*, 269 Ky. 558, 108 S. W. (2) 509, 511; *Chattanooga & Tennessee Power Co.* v. *Lawson*, 139 Tenn. 354, 201 S. W. 165, 168, 169, 170; *Evans* v. *Massman Construction Co.*, 243 Mo. 632, 122 S. W. (2) 924, 930, 931; *Alabama Power Co.* v. *Smith*, 229 Ala. 105, 155 So. 601, 604.

The District Engineer (R. 106, 109) and the Federal Power Commission interpreted Article 13 of petitioner's license (R. 100) as requiring petitioner to hold the waters of its reservoir up to elevation 750 at the dam gauge. The consequent "back-water curve" produced in the neighborhood of the respondent's property caused a percolation

of the reservoir waters into the basement of its school building which gave rise to the claim sued on. Petitioner is not liable for any error in judgment of the District Engineer in directing its acts in the interest of flood control after the reservoir rose above elevation 745. *Erskine* v. *Holnback*, 14 Wall. (U. S.) 613, 617, 20 L. Ed. 745, 747; *Stutsman County* v. *Wallace*, 142 U. S. 293, 309, 35 L. Ed. 1018, 1024; *Haffin* v. *Mason*, 15 Wall. (U. S.) 671, 675, 21 L. Ed. 196, 198; *Harding* v. *Woodcock*, 137 U. S. 43, 46, 47, 34 L. Ed. 580, 581; *Matthews* v. *Densmore*, 109 U. S. 216, 220, 27 L. Ed. 912, 913, 914; *Moore Ice Cream Co.* v. *Rose*, 289 U. S. 373, 381, 77 L. Ed. 1265, 1271.

2. The acceptance by petitioner of the Federal Power license, conditioned as it was regarding the control of floods and operations therefor, and the building of the dam as authorized thereby, did not constitute a wrong on petitioner's part for which it can be held liable to the respondent herein. The Federal Power Commission had jurisdiction to grant the license (*Grand River Dam Authority* v. *Going*, 29 F. S. 316, 325), because of its finding that the building of the project "will affect the interests of interstate commerce" (R. 18). Act of June 10, 1920, c. 285, Sec. 23, 41 Stat. 1075; Act of August 26, 1935, c. 687, Tit. II, Sec. 210, 49 Stat. 846; Tit. 16, Sec. 817, U. S. C.

Under the Act of its creation petitioner was authorized to make contracts necessary or convenient to the exercise of its powers, rights, privileges and functions. Tit. 82, Sec. 862n, O. S. 1941. The license was therefore lawfully accepted and did not constitute a ground for the imposition of liability on petitioner for the performance of acts required of it by the District Engineer in controlling floods.

3. The provisions of Tit. 82, Sec. 862, O. S. 1941, providing that petitioner should be liable for all damage caused by it, its agents, servants and employees, in creating, con-

structing, maintaining or operating its project to any person whose property was damaged, cannot control the question of petitioner's liability to respondent arising out of acts performed by petitioner in operating its reservoir for the purpose of flood control under instructions of the District Engineer as a representative of the Secretary of War. *State of Arizona* v. *State of California*, 283 U. S. 423, 451, 75 L. Ed. 1154, 1163, 1164; *Johnson* v. *State of Maryland*, 254 U. S. 51, 56, 57, 65 L. Ed. 126, 128, 129; *State of Ohio* v. *Thomas*, 173 U. S. 276, 283, 43 L. Ed. 699, 701; *Cunningham* v. *Neagle*, 135 U. S. 1, 61, 62, 34 L. Ed. 55, 70, 71; *State of Tennessee* v. *Davis*, 100 U. S. 257, 263, 25 L. Ed. 648, 650; *Hunt* v. *United States*, 278 U. S. 96, 100, 73 L. Ed. 200, 201; *James* v. *Dravo Contracting Co.*, 302 U. S. 134, 149, 150, 82 L. Ed. 155, 166, 167. That petitioner was a state agency does not alter its immunity under Federal law. *Osborne* v. *The Bank of the United States*, 9 Wheat. (U. S.) 738, 762, 763, 6 L. Ed. 204, 234. Petitioner could have avoided liability in this case only by refusing to obey the directions of the District Engineer in operating its reservoir for flood control purposes, which, if violative of the terms of its Federal Power license, would have subjected the latter to cancellation under the provisions of Section 26 of the Federal Power Act (Act June 10, 1920, c. 285, Sec. 26, 41 Stat. 1075, Tit. 16, Sec. 820 U. S. C.) Under these circumstances it was petitioner's duty to yield to the directions of the District Engineer as an authorized officer of the United States.

4. By complying with the provisions of its license and in performing the directions of the District Engineer for the control of floods petitioner committed no actionable wrong. *Nelson* v. *McKenzie-Hague Co.*, 192 Minn. 180, 256 N. W. 96, 98, 99.

5. The provisions of the Federal Power Act (Act of June 10, 1920, c. 285, Sec. 10c, 41 Stat. 1068; Act of August 26,

1935, c. 687, Tit. II, Sec. 203c, 49 Stat. 842; Tit. 16, Sec. 803c), and corresponding provisions of Article 17 of petitioner's license (R. 38) providing that the licensee shall be liable for all damages occasioned to the property of others by construction, maintenance or operation of the project did not create a liability in petitioner for having obeyed the directions of the District Engineer. *Alabama Power Co.* v. *Smith*, 229 Ala. 105, 155 So. 601, 604; *Louisville Hydro-Electric Co.* v. *Coburn*, 270 Ky. 631, 110 S. W. (2) 445, 448; *Humpich's Trustees* v. *Louisville Gas & Electric Co.*, 269 Ky. 558, 108 S. W. (2) 509, 511; *Corrigan Transportation Co.* v. *Sanitary District*, 125 F. 611, 613; Id. C. C. A. 7, 137 F. 851, 855. The provisions of the Act and of the license referred to are not calculated to create a new liability nor to make a licensee liable for the taking of property or for consequential damages thereto when taken or damaged at the direction of the United States. *Yearsley* v. *Ross Construction Co.*, 309 U. S. 18, 21, 23, 84 L. Ed. 557, 558; *Nelson* v. *McKenzie-Hague Co.*, 192 Minn. 180, 256 N. W. 96, 98, 99.

ARGUMENT.

Proposition I.

In carrying out the directions of the District Engineer for controlling floods after the reservoir reached elevation 745, petitioner acted as an instrument of the United States and is not liable for the injury sustained by respondent.

In carrying out the District Engineer's instructions, at the time in question, petitioner was engaged in the performance of a duty imposed on it by its Federal license in the furtherance of a National policy of flood control. The District Engineer was competent to give those directions, for he was authorized to that end by the Secretary of War (R. 104). The latter was authorized "to utilize the serv-

ices" of petitioner as a "public agency" (Act June 28, 1938, 52 Stat. 1223; Tit. 33, Sec. 701b-2, U. S. C.), in carrying out the purposes of the Act of June 22, 1936 (49 Stat. 1570; Tit. 33, c. 15, U. S. C.), and was further thereunto authorized by Articles 13 and 14 of petitioner's license (R. 37) which was granted and accepted under the Federal Power Act (49 Stat. 863, et seq.; Tit. 16, c. 12, U. S. C.), in accordance with the particular provisions thereof previously noticed in the petition. That Grand River is non-navigable (*United States* v. *Elliott*, (C. C. A. 10) 131 F. (2) 720, 723; *Grand River Dam Authority* v. *Going*, 29 F. S. 316, 321) was no bar to Federal jurisdiction for the Commission found that "the construction and operation of said project in the manner proposed by the declarant will affect the interests of interstate commerce" (R. 18). The fact that the building of petitioner's project "will affect navigable stages of the Arkansas River, a navigable water of the United States, to which said Grand River is a tributary" (R. 18), fully justified Federal activity in controlling floods through its means. *Oklahoma, ex rel. Phillips,* v. *Guy F. Atkinson Co.*, 313 U. S. 508, 525, 85 L. Ed. 1487, 1500.

Petitioner was acting under the authority of laws of the United States and in obedience to orders within the jurisdiction of the District Engineer to give. The reservoir had risen beyond the maximum elevation (745) to which petitioner might control its operation, and beyond the minimum stage at which the District Engineer should take over (R. 37). Petitioner had no alternative but to carry out the directions which the latter gave. Its hydraulic engineer drew the District Engineer's attention to the fact that holding water to elevation 749.7 at the dam would produce the back-water curve of which complaint is herein made, but was told to carry out the instructions given (R. 123). While it could be argued that Article 13 of the license did not

require the holding of water to any point in the reservoir above elevation 750 and that, therefore, the District Engineer ought not have ordered it and petitioner ought not to have obeyed the order, the District Engineer appears to have construed the license as applying to elevation 750 at the dam gauge, notwithstanding the probability of a back-water curve at the head of the lake, and the Federal Power Commission assented to this interpretation (R. 99-100). At any rate, the War Department did not repudiate the District Engineer's interpretation of the license in this respect (R. 97-98). Usually, an interpretation placed upon a statute or regulation by the department of Government charged with its administration is persuasive as to its meaning. *Blanset* v. *Cardin*, 256 U. S. 319, 326, 65 L. Ed. 950, 954. Public officers are generally presumed to have acted within the scope of their authority (*United States* v. *Chemical Foundation*, (D. C.) 300, 326; 65 C. J. 1277) and to have properly performed the duties enjoined upon them by law. *Ross* v. *Stewart*, 227 U. S. 530, 535, 57 L. Ed. 626, 629; *Nofire* v. *United States*, 164 U. S. 657, 660, 41 L. Ed. 588, 590. The instructions of the District Engineer were not beyond his authority to give.

It has been quite uniformly held by this Court that an agent or officer of the United States, in carrying out directions given him by a superior officer or agent within the latter's jurisdiction to give, cannot be pursued, but is clothed with immunity from liability. *Yearsley* v. *W. A. Ross Construction Co.*, 309 U. S. 18, 21, 84 L. Ed. 554, 556; *United States* v. *Lynah*, 188 U. S. 445, 465, 47 L. Ed. 539, 541; *Den* v. *Hoboken Land & Improvement Co.*, 18 How. (U. S.) 272, 283, 15 L. Ed. 372, 377; *Lamar* v. *Browne*, 92 U. S. 137, 199, 23 L. Ed. 650, 655; *The Habana*, 189 U. S. 453, 465, 47 L. Ed. 901, 903. In the State courts, save Oklahoma, this doctrine has commanded adherence. *Humpich's Trustees* v. *Louisville Gas & Electric Co.*, 269 Ky. 558, 108

S. W. (2) 509, 511; *Chattanooga & Tennessee Power Co.* v. *Lawson,* 139 Tenn. 354, 201 S. W. 165, 168, 170; *Evans* v. *Massman Construction Co.,* 243 Mo. 632, 122 S. W. (2) 924, 931; *Alabama Power Co.* v. *Smith,* 229 Ala. 105, 155 So. 601, 604. It was said in *Den* v. *Hoboken Land & Improvement Co., supra,* that an agent of the United States:

> "cannot be made responsible in a judicial tribunal for obeying the lawful command of the government."

That the District Engineer may have been imprudent in directing the measures which brought the reservoir above elevation 750 at Wyandotte, with the resultant flooding of the basement of the school building through percolation, or may have erred in judgment, does not render petitioner responsible legally for having carried out the directions given. *Erskine* v. *Holnback,* 14 Wall. (U. S.) 613, 617, 20 L. Ed. 745, 747; *Stutsman County* v. *Wallace,* 142 U. S. 293, 309, 35 L. Ed. 1018, 1024; *Haffin* v. *Mason,* 15 Wall. (U. S.) 671, 675, 21 L. Ed. 196, 198; *Harding* v. *Woodcock,* 137 U. S. 43, 46, 47, 34 L. Ed. 589, 591; *Matthews* v. *Densmore,* 109 U. S. 216, 220, 27 L. Ed. 912, 913, 914; *Moore Ice Cream Co.* v. *Rose,* 289 U. S. 373, 381, 77 L. Ed. 1265, 1271. Any other principle would make the agent the judge of the wisdom or propriety of the orders received; at his peril to obey or not, as he might decide the prudence of their conception and the desirability of their execution.

Petitioner did not serve its own interest in operating the reservoir in conformity with the District Engineer's instructions above elevation 745, for the flood control storage thereabove was "expressly reserved" for the control of floods which, as everyone knows, is designed to protect property and aid navigation downstream. The license (Article 13) forbade the use of the flood storage space for power generation, except as a mere incident to the holding or discharge of waters under the direction of the Secretary

of War. The case, in this aspect, is parallel to *Humpich's Trustees* v. *Louisville Gas & Electric Co., supra.*

The Oklahoma Supreme Court did not conclude that the directions of the District Engineer were beyond his authority to give as an officer of the United States, but, as indicated by the third head-note of its opinion, appears to have concluded that his instructions were authorized (R. 124). It should have sustained the plea of immunity set up by the exceptions to the appraisers' report (R. 15, 17) and reversed the judgment of the district court.

PROPOSITION II.

The acceptance of its Federal power license by petitioner, conditioned as it was regarding flood control operations, and the building of the dam as thereby authorized did not constitute a wrong because of which petitioner is liable herein.

While conceding that under *Yearsley* v. *W. A. Ross Construction Co., supra,* petitioner would not be liable "if the federal government had contracted with it to construct the dam or had employed it to operate the dam as a flood control project," the Supreme Court of Oklahoma concluded that in obligating itself to provide flood control storage, the petitioner "is liable to third parties exactly as though it had performed the acts of its own volition, which in legal effect it did, for it was not required to accept the provisions of the license and construct the dam" (R. 129). That the United States, through the Secretary of War, as authorized by the Act of June 28, 1938 (52 Stat. 1223; Tit. 33, Sec. 701b-2, U. S. C.) did "utilize the service of" petitioner, through the medium of the petitioner's license for carrying out a National policy of flood-control is clear from what has been said and, therefore, under the Supreme Court of Oklahoma's own reasoning petitioner is within the immunity set

up. But, adverting to the purported distinction, inquiry should be made briefly into the soundness of the conclusion that by accepting the license and constructing its dam, petitioner became liable to respondent for damages suffered by flood control measures directed by the District Engineer. It seems patent that neither the acceptance of the license nor the construction of the dam had any causal connection whatever with respondent's injury. But, apart from this, did the taking of the license, without which the project could not be built as against the finding of the Federal Power Commission that its building "will affect the interests of interstate commerce" (R. 18; Act June 10, 1920, c. 285, Sec. 23, 41 Stat. 1075; Act Aug. 26, 1935, c. 687, Tit. II, Sec. 210, 49 Stat. 846; Tit. 16, Sec. 817, U. S. C.) and the building of the dam authorized thereby constitute acts which ipso facto gave rise to liability to a party whose lands might be injured by subsequent flood control operations?

The petitioner was created as an "agency" of the State of Oklahoma for the purpose, among others, "to develop and generate water power and electric energy" on Grand River (Tit. 82, Chapt. 8, O. S. 1941) and was authorized to "make contracts and to execute instruments necessary or convenient to the exercise of the powers, rights, privileges and functions conferred upon it" (Tit. 82, Sec. 862n, O. S. 1941). The jurisdiction of the Federal Power Commission to grant the license has been upheld. *Grand River Dam Authority* v. *Going*, 29 F. S. 316, 325. The power to contract with the United States for funds with which to construct the project has been recognized by the Supreme Court of Oklahoma. *Wickham* v. *Grand River Dam Authority*, 189 Okl. 540, 118 P. (2) 640. The right of the petitioner to accept a license, without which the project authorized could not have been constructed lawfully, can scarcely be doubted, nor does the opinion of the Supreme Court of

Oklahoma in this case deny it. The acts done, to-wit, the acceptance of the license in order to carry out the purposes of petitioner's creation and the building of the dam, were obviously lawful acts lawfully performed. In themselves, they constituted no injury to respondent. Much less do they constitute an exemption from the immunity of which Mr. Justice Holmes said (*The Habana*, 189 U. S. 453, 465, 47 L. Ed. 900, 903):

> "* * * we are not aware that it is disputed that when the act of a public officer is authorized or has been adopted by the sovereign power, whatever the immunities of the sovereign, the agent thereafter cannot be pursued."

It is not supposed that the United States, acting through an agent such as petitioner in a field of jurisdiction vouchsafed by the Constitution, acts wrongfully or that the agent employed is guilty of wrong in executing its directions. If private property be taken, a remedy is given in recognition of the Fifth Amendment, but the agent is not sueable. *Yearsley* v. *W. A. Ross Construction Co., supra* (309 U. S. p. 21).

PROPOSITION III.

Petitioner cannot be made liable by the law of Oklahoma for acts done in performing a Federal function.

The Supreme Court of Oklahoma said in the opinion herein:

> "* * * the defendant is a state agency, and its liability is fixed by the act under which it is created. 82 O. S. 1941, Sec. 862" (R. 129).

The part of the applicable Act referred to is:

> "Provided said District shall be liable for all damage caused by said District, its agents, servants and em-

ployees in creating, constructing, maintaining or operating said District to any corporation, partnership, person or individual whose property, either real or personal, within or without said District, has been damaged,'' etc. (Tit. 82, Sec. 862, O. S. 1941).

It is clear, we think, that no state may, by police regulation or otherwise, condition the carrying forward of flood control works by the United States. *State of Arizona* v. *State of California,* 283 U. S. 423, 451, 75 L. Ed. 1154, 1163, 1164. Too, a state may not lawfully impose a penalty against a carrier of the mails for failure to obtain a driver's license, when his competency to operate the vehicle had been determined, presumably, by the Post Office Department. *Johnson* v. *State of Maryland,* 254 U. S. 51, 56, 57, 65 L. Ed. 126, 128, 129. Likewise, a penalty may not be imposed by State law upon officers of the United States for performing their duties under Federal law. *State of Ohio* v. *Thomas,* 173 U. S. 276, 283, 43 L. Ed. 699, 701; *Cunningham* v. *Neagle,* 135 U. S. 1, 61, 62, 34 L. Ed. 55, 70, 71; *State of Tennessee* v. *Davis,* 100 U. S. 257, 263, 25 L. Ed. 648, 650; *Hunt* v. *United States,* 278 U. S. 96, 100, 73 L. Ed. 200, 201.

While agencies of the United States, for example, independent contractors engaged on construction of works for the Government, are not immune from regulation by the states (*James Stewart & Co.* v. *Sadrakula,* 309 U. S. 94, 105, 84 L. Ed. 596, 603) which are non-discriminatory and do not operate directly upon the contract or the contractor's performance of it, the qualification is observed (Id., 309 U. S. 103) that,

> ''the authority of state laws or their administration may not interfere with the carrying out of a national purpose.''

In considering the taxing power of the states, either as to contractor's property or net income, the Supreme Court

of the United States has been careful to point out the distinction which exists between a levy which operates as a charge upon the contract itself and one which operates uniformly upon the contractor and other taxpayer of the state. *James* v. *Dravo Contracting Co.*, 302 U. S. 134, 149, 150, 82 L. Ed. 155, 166, 167.

That petitioner (although a public agency of the State of Oklahoma) is more nearly a Federal agent for flood control in the strict sense than a contractor constructing flood control or river improvement works is manifested by the fact that the upper ten feet of storage space in its reservoir was reserved by the license which it holds "expressly for the control of floods," and petitioner is that character of public agency whose services the Secretary of War has been authorized to "utilize" for that purpose.

Petitioner's services performed in carrying out its share of the National program are gratuitous. Its control of the reservoir is forbidden when elevation 745 is reached (R. 37). The storage space up to elevation of 750 was provided at its own cost (R. 37). In operation of the flood control pool, it may not and does not act voluntarily; it acts only "when, as and in the manner" directed by the District Engineer (R. 37). It is completely subservient to Federal control. It does not, as does the independent contractor, promise a given result with a choice of means to that end. Its every function in controlling floods when the pool stage reaches elevation 745 is subject to the direction of the Secretary of War.

The liability herein affirmed was the immediate product of petitioner's act performed in the capacity of a Federal agent. That liability, if sustainable, must be said to arise out of its acts performed in obedience to the voice of the United States. Consequently, it burdens its function as a flood control agent and makes it liable, perforce the Oklahoma Statute, when otherwise clearly it would not be.

The circumstance that petitioner is a public corporation of the State of Oklahoma does not alter the principle of immunity which it invokes.

The immateriality of the *character* of the instrument chosen by the United States to perform a National function with respect to its immunity from state control was forcibly stated by Chief Justice Marshall in *Osborne* v. *The Bank of the United States*, 9 Wheat. (U. S.) 738, 762, 763, 6 L. Ed. 204, 234, in the following language:

> "We do not maintain that the corporate character of the bank exempts its operations from the action of state authority. If an individual were to be endowed with the same faculties, for the same purposes, he would be equally protected in the exercise of those faculties. * * * The business of the bank constitutes its capacity to perform its functions, as a machine for the money transactions of the government. Its corporate character is merely an incident, which enables it to transact that business more beneficially."

So, the fact that the petitioner is a creature of the law of the State of Oklahoma does not mean that, while acting as a Federal agent and within its corporate powers, it is yet subject to be controlled, muleted or prevented by the laws of the State, or rendered liable for activities in its Federal character to penalties or liabilities imposed by State law which may render it either an impotent or unwilling agent.

The anomaly presented by the instant case is illustrated by the following: By the statute of Oklahoma to which the Supreme Court of Oklahoma has referred, petitioner is said to have become liable for having carried forward the directions of the representative of the Secretary of War in operating the reservoir for flood control purposes. Assume, then, that petitioner had refused to carry out such directions? By the provisions of Section 26 of the Federal

Power Act (Act June 10, 1920, c. 285, Sec. 26, 41 Stat. 1076; Tit. 16, Sec. 820, U. S. C.), its license would be subject to be revoked in an equity proceeding instituted by the Attorney General at the instance of either the Secretary of War or the Federal Power Commission and its project might be liquidated by decree. Thus, by yielding to the directions of the District Engineer, in the instant case, petitioner became liable under State law, as the Supreme Court of Oklahoma has said, whereas had it refused compliance, its business was liable to be wound up under Federal law.

As was said in *Southern Railway Co.* v. *Reed*, 222 U. S. 424, 442, 56 L. Ed. 257, 262, in which an interstate carrier was sought to be subjected to a penalty provided by state statute for refusing acceptance of a shipment before a rate had been fixed therefor, as required by Federal statute:

> "If the carrier obey the state law, he incurs the penalties of the Federal law; if he obey the Federal law, he incurs the penalties of the state law. Manifestly one authority must be paramount, and when it speaks the other must be silent. We can see no middle ground."

Henry Ford & Son, Inc., v. *Little Falls Fibre Co.*, 280 U. S. 369, 378, 379, 74 L. Ed. 483, 488, 489, held a Federal Power licensee liable for the infringement of water rights of an upstream proprietor by the erection of flashboards upon a Government dam on a navigable stream permitted by its license. That case is not believed to bear upon the one at bar because the licensee there was carrying forward its own enterprise, in its own interest and for its own advantage and it was said that the Federal Power Act "does not purport to authorize a licensee of the commission to impair such rights recognized by state law without compensation." The mere grant of a Federal Power license does not, of itself, constitute the licensee a Federal agent,

Broad River Power Co. v. *Query*, 288 U. S. 178, 180, 181, 77 L. Ed. 685, 687, where it was said that the tax there complained of,

> "is not laid upon the license granted by the Federal Water Commission but upon the production and sale of power which the company generates at its own pleasure and exclusively for its own profit."

The distinguishing feature of the instant case is that the petitioner was acting for the United States and under its direction in furthering a National function in the regulation of interstate commerce; not to achieve a private objective of its own. Its immunity is clearly akin to the immunity which would have clothed officers of the War Department had they physically performed the act of which complaint is made. *United States* v. *Lynah*, 188 U. S. 445, 465, 47 L. Ed. 539, 541. The distinction sought to be drawn by the Supreme Court of Oklahoma is not valid. Such was the conclusion of the court in *Alabama Power Co.* v. *Smith*, 229 Ala. 105, 155 So. 601, 604, where *Ford & Sons, Inc.*, v. *Little Falls Fibre Co., supra*, was considered in this connection.

PROPOSITION IV.

The Supreme Court of Oklahoma erroneouslyl decided that by placing itself in a position where, by complying with its license, petitioner committed the wrong complained of.

The Supreme Court of Oklahoma noted that petitioner had not acquired lands or flowage rights above elevation 750 in the reservoir area and that if, under the terms of the license, the District Engineer had a right to require the impounding of flood waters up to elevation 749.7, as he did, petitioner should have anticipated that possibility and should have acquired such lands and rights to whatever ele-

vation the back-water curve might reach, failing in which and by complying with the license "it committed the wrong to third parties here complained of" (R. 130). It is quite evident from the record that the waters which invaded respondent's basement and wrought the injury complained of did not flow over the surface of the school grounds and spill into the basement; they percolated through the loose soil underlying the surface of the school grounds (R. 50-51, 57, 78, 49, 62-63). The crest of the reservoir waters did not reach the building. Thus it is clear that had petitioner acquired flowage rights or lands up to approximately elevation 752 to accommodate the flowage of the back-water curve, the respondent's basement would have been flooded, precisely as happened. By Article 12 of petitioner's license (R. 37) it was required to secure "all necessary lands, easements, and rights-of-way up to elevation 750," except as to railroads, and by Article 13 (R. 37) it was provided that "the licensee shall not be required to impound any water above elevation 750 until the United States has acquired the necessary flowage rights above that elevation." The critical point seems to have been whether elevation 750 applied at the dam or at any point on the reservoir. The former was the view of the District Engineer and the Federal Power Commission. That these Government authorities were possessed of the right to decide the issue is not challenged. The provisions of Articles 12 and 13 of the license, above noted, imply that the United States would be responsible for the acquisition of lands above elevation 750 and, correspondingly, responsible for any invasion or destruction thereof if required in the interest of flood control. Any error in judgment on the part of the District Engineer is not chargeable to petitioner, provided he had the power to judge, upon the principle heretofore noted. If petitioner responded to directions which the District Engineer was authorized to give, then it may not be sued.

Yearsley v. *Ross Construction Co., supra* (309 U. S. pp. 20, 21, 84 L. Ed., p. 557) and the decisions therein cited.

As was said in *Evans* v. *Massman Construction Co.*, 243 Mo. 632, 122 S. W. (2) 924, 931:

> "The government had a right to improve the river and the government had a right to hire somebody to do the work for it and any errors or mistakes made by the government in the plans or in the direction of the work to be done by defendant thereunder cannot afford a basis for plaintiff's recovery from the defendant."

The holding that compliance with the provisions of the license was a wrongful act on petitioner's part effectively strikes down those principles which shield the Government's agents and officers from personal responsibility when engaged in the performance of their official duties, within the scope of directions given them under authority of law. If the petitioner, as the tool of the Secretary of War, be liable, then why not the Secretary of War for the acts complained of were the result of directions given by the latter's authorized representative? The denial of the plea of immunity is not sustainable on such a basis. *Nelson* v. *McKenzie-Hague Co.*, 192 Minn. 180, 256 N. W. 96, 98, 99.

PROPOSITION V.

Neither the Federal Power Act nor the provisions of Article 17 of petitioner's license create the liability asserted.

The Federal Power Act (Act June 10, 1920, c. 285, Sec. 10 (c), 41 Stat. 1068; Act Aug. 26, 1935, c. 687, Tit. II, Sec. 203 (c), 49 Stat. 842; Tit. 16, Sec. 803 (c) provides in part:

> "Each licensee hereunder shall be liable for all damages occasioned to the property of others by the construction, maintenance, or operation of the project

works or of the works appurtenant or accessory thereto, constructed under the license, and in no event shall the United States be liable therefor."

Article 17 of the petitioner's license provides the same (R. 38).

Do these create a new liability, i. e., render petitioner liable for the injury to respondent resulting from obedience to the directions of the District Engineer? The Supreme Court of Oklahoma did not so hold and did not deny the soundness of the decisions denying that such a liability is thereby imposed. In *Alabama Power Co.* v. *Smith*, 229 Ala. 105, 155 So. 601, 604, the court squarely held that the provision of the Act above was not intended to create a liability but to provide for the assumption by the licensee of whatever liability that "may legally arise." Corresponding provisions of Federal Power licenses have been held to have been intended "for the sole purpose of protecting the United States," and that thereby the licensee assumes responsibility for "damages legally enforceable," as distinguished from creating a right of action in favor of third persons. *Louisville Hydro-Electric Co.* v. *Coburn*, 270 Ky. 631, 110 S. W. (2) 445, 448; *Humpich's Trustees* v. *Louisville Gas & Electric Co.*, 269 Ky. 558, 108 S. W. (2) 509, 511. Similar provisions of a navigational license have been likewise construed. *Corrigan Transportation Co.* v. *Sanitary District* (D. C.), 125 F. 611, 613; Id. (C. C. A. 7), 137 F. 851, 855.

Prior to the Flood Control Act of June 22, 1936 (49 Stat. 1570), the control of floods on non-navigable waters as a matter of National policy was in an embryonic state and it may be doubted that Congress had in mind a case of this kind. *Humpich's Trustees* v. *Louisville Gas & Electric Co., supra* (108 S. W. (2), p. 511). A design to impose upon

a licensee a liability for damages for having carried out competent directions of the Secretary of War in a flood emergency, to protect navigation, would require most compelling language, for the principle is settled that the agent of the Government performing its functions is not liable for consequential injuries resulting (*Yearsley* v. *Ross Construction Co.*, 309 U. S. 18, 23, 94 L. Ed. 554, 558) no more than the United States (*Bedford* v. *United States*, 192 U. S. 217, 224, 225), while if the agent acts to "take" property within the contemplation of the Fifth Amendment to the Constitution of the United States, the Government impliedly promises compensation and has "afforded a remedy for its recovery by a suit in the Court of Claims." (*Yearsley* v. *Ross Construction Co., supra,* 309 U. S., p. 21, 84 L. Ed., p. 557). In either case the agent is not liable. It would be entirely out of harmony with a proper intent to conclude that the Federal Power Act means that a licensee should compensate a land owner for property "taken" by the direction of the United States and for its account in carrying out its flood control program, for which in law and morals the Government should pay. It is equally unreasonable to suppose that Congress intended that a licensee, when performing acts for the direct account of the United States, should be liable for consequential injuries to the property of another for which no legal liability could arise against the Government. Nowhere does it appear that a licensee, circumstanced as was petitioner, is to be made the insurer against loss to others produced by the acts of the Government and its authorized officers. It is believed that neither the Act nor the license were designed to impose any liability upon the licensee other than as such liability might be created by it upon its own responsibility; not for having done an act at the Government's command in carrying out a Federal function.

Conclusion.

It is concluded that the decision and judgment of the Supreme Court of Oklahoma should be reversed for the reasons above stated.

Respectfully submitted,

EDWARD P. MARSHALL,
ROBERT L. DAVIDSON,
JESSE L. BALLARD,
Attorneys for Petitioner,
421 Kennedy Building,
Tulsa, Oklahoma.

APR 12 1944

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 758.

GRAND RIVER DAM AUTHORITY, A PUBLIC CORPORATION, PETITIONER,

VS.

THE BOARD OF EDUCATION OF THE TOWN OF WYANDOTTE, OKLAHOMA, INDEPENDENT SCHOOL DISTRICT No. 1, RESPONDENT.

ANSWER BRIEF.

FRANK NESBITT,
NELLE NESBITT,
Miami, Oklahoma,
Attorneys for Respondent.

INDEX

I. Statement As to Nature of Action 1

II. Statement of Facts 2

III. Summary of Argument 8

IV. Brief and Argument 10

Controversy in case involves only a dispute of facts on which the authority was exercised and the immunity claimed, by reason whereof jurisdiction should be refused 11

Champion Lumber Co. vs. Fisher, 227 U. S. 445, 57 L. Ed. 591, 33 Sup. Ct. Rep. 329 ..... 8, 11

Foreman vs. Meyer, 227 U. S. 452, 57 L. Ed. 594, 33 Sup. Ct. Rep. 331 ..... 8, 11

Hyatt vs. People ex rel. Corkran, 188 U. S. 691, 47 L. Ed. 657, 23 Sup. Ct. Rep. 456 ..... 8, 11

Ireland vs. Woods, 246 U. S. 323, 62 L. Ed. 745, 38 Sup. Ct. Rep. 319 ..... 8, 11

The petitioner herein exceeded any authority it may have had as an agency of the United States in flooding lands which it was required to acquire by the license of the Federal Power Commission, but failed to do, and by reason thereof it has no immunity against suit 15

American School of Magnetic Healing vs. McAnnulty, 187 U. S. 94, 23 Sup. Ct. Rep. 33, 38 ..... 8, 18

Belknap vs. Schild, 161 U. S. 10, 16 Sup. Ct. Rep. 443, 40 U. S. (L. Ed.) 599 ..... 8, 16

Bates vs. Clark, 95 U. S. 204, 24 U. S. (L. Ed.) 471 ..... 8, 16

Cammeyer vs. Newton, 94 U. S. 225, 235, 24 U. S. (L. Ed.) 72 ..... 8, 17

Campbell vs. James, 17 Blatchf. 42, 4 B. & A. Pat. Cas. 456, 4 Fed. Pat. Cas. No. 2361 ..... 8, 17
Campbell vs. James, 18 Blatchf. 92, 2 Fed. 338 ..... 8, 17
Head vs. Porter, 48 Fed. 481 ..... 8, 17
Hawks vs. Seay, 150 Okla. 160, 1 Pac. 2d 148 8-9
Little vs. Barreme, 2 Cranch 170, 2 L. Ed. 243 9
Noble vs. Union River Logging R. R. Co., 147 U. S. 165, 171, 172, 13 Sup. Ct. Rep. 271, 272, 273, 37 L. Ed. 123 9
Philadelphia Company vs. Stimson, 223 U. S. 605, 619, 620, 32 Sup. Ct. Rep. 340, 344, 56 L. Ed. 570 ..... 9, 16
Scranton vs. Wheeler, 179 U. S. 141, 152, 21 Sup. Ct. Rep. 48, 52, 45 L. Ed. 126 9
Tindal vs. Wesley, 167 U. S. 204, 222, 17 Sup. Ct. Rep. 770, 777, 42 L. Ed. 137 9
United States vs. Lee, 106 U. S. 196, 220, 221, 1 Sup. Ct. Rep. 240, 260, 261, 27 L. Ed. 171 9
Wentz vs. Ingenthron, 146 Okla. 165, 294 Pac. 154 9
Wentz vs. Board of Comr's, 147 Okla. 173, 295 Pac. 599 9
Wentz vs. Dawson, 149 Okla. 94, 299 Pac. 493 9
State Highway Commission vs. Younger, 170 Okla. 614, 41 Pac. 2d 686 ..... 9, 17

V. Conclusion 21

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 758.

GRAND RIVER DAM AUTHORITY, A PUBLIC CORPORATION, PETITIONER,

VS.

THE BOARD OF EDUCATION OF THE TOWN OF WYANDOTTE, OKLAHOMA, INDEPENDENT SCHOOL DISTRICT No. 1, RESPONDENT.

ANSWER BRIEF.

I.

STATEMENT AS TO NATURE OF ACTION.

As originally instituted, this is a special proceeding for the recovery of damages, filed in the District Court of Ottawa County, Oklahoma, by the Board of Education of the Town of Wyandotte, Oklahoma, Independent School District No. 1, as plaintiff, against the Grand River Dam Authority, a public corporation, as defendant, predicated on the "Conservancy Act" of the State of Oklahoma, Tit. 82, Sec. 664, Okla. Stats. Ann.

Pursuant to the provisions of Section 61 of said Act, the Judge of said District Court appointed appraisers to view the property in question and appraise the damages, if any. These appraisers took the oath of office as such, viewed the premises, and as shown by their Report (R. 7, 8) determined the damages due plaintiff in the sum of $873.65. Exceptions to this Report were filed by both plaintiff and defendant, and, after a trial of the issues made by the exceptions, the said District Court rendered judgment in favor of plaintiff against defendant for the sum of $902.65 (R. 94, 95, 96). Defendant filed a Motion for new trial, same was heard and overruled and an appeal was prosecuted to the Supreme Court of the State of Oklahoma by defendant, where the judgment of the trial court was affirmed (R. 125 to 130, incl.).

II.

STATEMENT OF FACTS.

The Grand River Dam Authority is a public corporation organized and functioning by virtue of an Act of the Oklahoma Legislature approved April 26, 1935 (Okla. S. L., 1936, Ch. 70, Art. 4, Sec. 1; Tit. 82, Sec. 861, Okla. Stats. Ann.).

By virtue of this Act the Grand River Dam Authority is authorized to control, store and preserve the waters of the Grand river and its tributaries and make use of such waters for irrigation purposes, the generation of electrical energy, and other useful purposes. The Authority has erected a large dam across Grand river in Mayes County, Oklahoma, near the Town of Pensacola, and by means thereof it has converted the waters of Grand river (above the dam), Neosho and Spring rivers into a large lake that extends some 55 miles above the dam.

Inasmuch as this dam and its operation affects the navigable stages of the Arkansas river, the Authority procured a license from the Federal Power Commission authorizing the construction and operation of this dam, its power plant, etc. This license requires the Authority to acquire all necessary land for its lake bed, bordering the Grand river and its tributaries, up to elevation 750 feet above mean sea level (R. 37), it authorizes the use of the waters of the lake up to elevation 745 feet for power production purposes, and limits the use of the waters of the lake from elevation 745 feet to 755 feet to control floods. The license provides that the impounding and releasing of the waters of the lake between elevations 745 feet and 755 feet shall be under the direction of the Secretary of War or his authorized representative, with this further provision (R. 37):

> "Article 13. * * * *provided: that the Licensee shall not be required to impound any water above elevation 750 until the United States has acquired the necessary flowage rights above that elevation.*"

It was stipulated during the trial of the case in the trial court, that neither the Authority nor the United States has ever acquired flowage rights above elevation 750 feet, over the lands in question or in the vicinity thereof (R. 44). Section 17 of the License (R. 38) makes the Authority liable for all damages occasioned to the property of others on account of the construction, operation and maintenance of the "project works" or of the works appurtenant or accessory thereto, and in no event shall the United States be liable therefor.

For the purpose of controlling flood waters flowing into its said lake the Authority has equipped its dam with several large water gates, so that it was able to control the water level of its lake between the 745 foot and 750

foot levels by the opening and/or closing of one or more of these gates.

The Respondent Board of Education owns a tract of land in the Town of Wyandotte, Oklahoma, on which several school buildings are located and the property is used solely for public school purposes. The 750 foot contour line of the Authority's lake bed just touches the northwest corner of this school property (R. 60), and the gymnasium building which is the nearest, is about 100 feet from this contour line (R. 49). This gymnasium stands on relatively high ground, there being quite an abrupt drain towards the northwest into the lake itself (R. 87), and the ground towards the northwest of the gymnasium is principally gravel (R. 49). The gymnasium floor is two or three feet below the surface of the ground (R. 81). A deep water well, which is the sole supply of drinking water for the school children is located at the southwest corner of the gymnasium (R. 61), within four to six feet of that building (R. 50), and the surface of the ground at the well is four to five feet above the 750 foot level (R. 64).

When the water in Authority's lake stands below the 750 foot level, the water in this deep well doesn't get muddy (R. 76), *and there is no water on the gymnasium floor* (R. 80), *but when the water in Authority's lake got up to the approximate elevation of 752 feet there was about 4 inches of water on the gymnasium floor* (R. 80), *and the water in the well was thick* (R. 76). THUS, IT IS PLAIN THAT WHETHER OR NOT THE WATER OF AUTHORITY'S LAKE AFFECTED RESPONDENT'S PROPERTY DEPENDED ALTOGETHER ON WHETHER OR NOT THE WATER LEVEL OF THE LAKE WAS MAINTAINED ABOVE OR BELOW THE 750 FOOT ELEVATION.

In the months of October and November, 1941, heavy rains caused a considerable volume of flood water to flow down the Neosho and Spring rivers into the Authority's lake. When the dam gauge showed the water level of the lake had risen above the 745 foot elevation W. C. Burnham, the Authority's hydraulic engineer, notified the Divisional engineer of the War Department located at Tulsa, Oklahoma, and thereafter Burnham regulated the water level of the lake by the opening and/or closing of the dam gates under the orders of the Divisional engineer of the War Department (R. 100, 111). On October 30, 1941, Burnham received an order by wire from this Divisional engineer (R. 109) as follows:

> "You are hereby directed to open one main spillway gate immediately. Seven main spillway gates and one small spillway gate will be kept open until further instructions are received. If the reservoir reaches elevation 749.7 spillway gates will be opened so that the outflow will approximately balance the inflow. Under no circumstances will the pool level be allowed to rise above elevation 750.0 on the dam gate."
>
> Montgomery.

When Burnham received this wire he immediately called the Divisional engineer by phone and advised him that *an elevation of* 749.7 *feet of the water level of the lake at the dam gauge meant an elevation of about* 752 *feet at Wyandotte* (R. 123, 124), but he was instructed to proceed according to instructions, nevertheless. Acting on this order from the Divisional engineer, Burnham permitted the water level of the lake to build up to elevation 749.7 feet by the dam gauge (R. 123, 124), and, exactly as Burnham had told the Divisional engineer, the water level of the lake at Wyandotte reached the approximate elevation of 752 feet (R. 47, 75), *or some*

two feet above the elevation to which the Authority had acquired land for its lake bed, forcing the back water of the lake upon and over the school property about 50 feet beyond the 750 foot contour line (R. 48, 55) and so close to the gymnasium building that the water infiltrated through the gravel soil the remaining distance into the building where it stood about four inches deep on the oak floor of the gymnasium proper and from ten to twelve inches deep in the side and dressing rooms (R. 49) and filled the deep water well full of muddy water.

The finish on the oak floor of the gymnasium was ruined and the floor buckled in several places (R 64), as much as a foot (R. 65), athletic equipment and musical instruments were damaged (R. 66, 67), the water in the deep water well could not be used for drinking purposes (R. 70), trash and debris was piled up on the school grounds causing noxious odors (R. 74), and it was necessary to dismiss school during the period of both overflows (R. 74).

The Town of Wyandotte, Oklahoma, is located at the confluence of the Neosho and Spring rivers, where the Grand river begins. When flood waters flow down the Neosho and Spring rivers and strike the stationary water of the main body of the lake at this point of confluence, the stationary water of the lake is almost as effective a dam as stone and concrete and causes a pile-up of water, raises the water level of the lake at that point some two or three feet higher than further down the lake, and forces the back water over the immediately surrounding territory. *This fact was well known to W. C. Burnham, the Authority's hydraulic engineer* (R. 123), and is commented on by the Federal Power Commission in its letter to the Authority, which letter was introduced in evidence by the Authority itself (R. 100) *in haec verba*:

"It is a known fact that backwater effects result from the impounding of waters *and failure to take such effects into consideration in acquiring sufficient lands cannot create a liability against the United States.* Articles 12 and 13 of the License confirm this interpretation."

Therefore, if the term—*"750 foot level"*—as that term is used in the License, means the water level of the lake as fixed by the gauge at the dam, as the Authority now contends, *then the Authority should have taken these well known backwater effects into consideration in acquiring land for their lake bed and should have acquired land to the 752 or 753 foot elevation in the vicinity of Wyandotte,* for certainly there is no law nor is there any authority in the License of the Federal Power Commission that would permit the accumulation of water in the lake to the 750 foot elevation at the dam, and thereby cause a trespass on the land and a damage to the property of others in the Town of Wyandotte with two or three feet of backwater.

On the other hand if the term—*"750 foot level"*—as that term is used in the License, means the water level of the lake at all points thereon, then, in view of the admitted fact that neither the Authority nor the United States had acquired land in the vicinity of Wyandotte for their lake bed above the 750 foot elevation (R. 44), the Divisional engineer was acting beyond his jurisdiction and the lawful scope of his authority in directing the water level to be built up to the 749.7 foot level by the dam gauge when he knew that such level meant a water level of 752 to 753 feet at Wyandotte, and the Authority should have refused to obey such unlawful and unauthorized order in view of the following quoted portion of Article 13 of the License (R. 37), towit:

"The Licensee shall impound flood waters in the storage space between elevations 745 and 755, and release flood waters therefrom, when, as, and in the manner directed by the Secretary of War, or his authorized representative: *Provided, that the Licensee shall not be required to impound any water above elevation* 750 *until the United States has acquired the necessary flowage rights above that elevation.*"

III.

SUMMARY OF ARGUMENT.

1. The controversy in this case involves only a dispute of facts on which the authority was exercised and the immunity claimed, by reason whereof jurisdiction should be refused. *Champion Lumber Company* v. *Fisher,* 227 U. S. 445, 57 L. Ed. 591, 33 Sup. Ct. Rep. 329; *Foreman* v. *Meyer,* 227 U. S. 452, 57 L. Ed. 594, 33 Sup. Ct. Rep. 331; *Hyatt* v. *People ex rel. Corkran,* 188 U. S. 691, 47 L. Ed. 657, 23 Sup. Ct. Rep. 465; *Ireland* v. *Woods,* 246 U. S. 323, 62 L. Ed. 745, 38 Sup. Ct. Rep. 319.

2. The Petitioner herein exceeded any authority it may have had and acted in excess of any authority as an agency of the United States in flooding lands which it was required to acquire by the License granted to it by the Federal Power Commission, but failed to do so, and by reason thereof it has no immunity against suit. *American School of Magnetic Healing* v. *McAnnulty,* 187 U. S. 94, 23 Sup. Ct. Rep. 33, 38; *Belknap* v. *Schild,* 161 U. S. 10, 16 Sup. Ct. Rep. 443, 40 U. S. (L. Ed.) 599; *Bates* v. *Clark,* 95 U. S. 204, 24 U. S. (L. Ed.) 471; *Cammeyer* v. *Newton,* 94 U. S. 225, 235, 24 U. S. (L. Ed.) 72; *Campbell* v. *James,* 17 Blatchf. 42, 4 B. & A. Pat. Cas. 456, 4 Fed. Pat. Cas. No. 2361; *Campbell* v. *James,* 18 Blatchf. 92, 2 Fed. 338; *Head* v. *Porter,* 48 Fed. 481; *Hawks* v. *Seay,*

150 Okla. 160, 1 Pac. 2d 148; *Little* v. *Barreme,* 2 Cranch 170, 2 L. Ed. 243; *Noble* v. *Union River Logging R. R. Co.,* 147 U. S. 165, 171, 172, 13 Sup. Ct. Rep. 271, 272, 273, 37 L. Ed. 123; *Philadelphia Company* v. *Stimson,* 223 U. S. 605, 619, 620, 32 Sup. Ct. Rep. 340, 344, 56 L. Ed. 570; *Scranton* v. *Wheeler,* 179 U. S. 141, 152, 21 Sup. Ct. Rep. 48, 52, 45 L. Ed. 126; *Tindal* v. *Wesley,* 167 U. S. 204, 222, 17 Sup. Ct. Rep. 770, 777, 42 L. Ed. 137; *United States* v. *Lee,* 106 U. S. 196, 220, 221, 1 Sup. Ct. Rep. 240, 260, 261, 27 L. Ed. 171; *Wentz* v. *Ingenthron,* 146 Okla. 165, 294 Pac. 154; *Wentz* v. *Board of Comr's,* 147 Okla. 173, 295 Pac. 599; *Wentz* v. *Dawson,* 149 Okla. 94, 299 Pac. 493; *State Highway Commission* v. *Younger,* 170 Okla. 614, 41 Pac. 2d 686.

IV.

BRIEF AND ARGUMENT.

Petitioner seeks to invoke the jurisdiction of the Supreme Court of the United States on the ground that, at the time petitioner inflicted the injury and caused the damage to Respondent's property, for which recovery has been sustained by the State Courts, it was acting as an agency of the United States, was entitled to the same immunity from suit as the United States, that it claimed that immunity in the State Courts and the same was denied. Petitioner therefore claims the case comes within the provisions of Section 237c of the Judicial Code, as amended by the Act of January 31, 1928, Ch. 14, Sec. 1 (45 Stat. 54), Tit. 28, Sec. 344b, U. S. C. A., which, in part, provides:

> "It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by appeal, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a state * * *; or where any title, right, privilege or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under the United States * * *."

In keeping with the opinion and decision of the Supreme Court of the State of Oklahoma, Respondent takes the position, (1) that the injury and damage to its property was the direct result of Petitioner's negligence, its failure to comply with the terms of the license granted it by the Federal Power Commission, and to abide by the orders of the engineers of the War Department, in that (a) The Petitioner did not acquire the necessary lands for

its lake bed as required by the license, (b) The Petitioner did not keep the water level of its lake below the 750 foot elevation as directed by the engineers of the War Department, and by reason of such failures and neglect Petitioner cannot claim immunity from action in damages.

Thus, the primary dispute decided by the State Courts did not involve any question as to the existence or validity of the claimed immunity, but was a dispute of facts upon which the authority was exercised and the immunity claimed, under which circumstances this Honorable Court has uniformly refused to assume jurisdiction. *Ireland* v. *Woods*, 246 U. S. 323, 62 L. Ed. 745, 38 Sup. Ct. Rep. 319; *Champion Lumber Co.* v. *Fisher*, 227 U. S. 445, 57 L. Ed. 591, 33 Sup. Ct. Rep. 329; *Foreman* v. *Meyer*, 227 U. S. 452, 57 L. Ed. 594, 33 Sup. Ct. Rep. 331; *Hyatt* v. *People ex rel. Corkran*, 188 U. S. 691, 47 L. Ed. 657, 23 Sup. Ct. Rep. 456.

Article 12 of the License granted Petitioner by the Federal Power Commission, required Petitioner to acquire lands for its lake bed to the 750 foot level (R. 37). Petitioner admits that it acquired land to the 750 foot level only, *at all points on its lake* (R. 44). Petitioner admits that its hydraulic engineer knew that due to the pile-up of water at Wyandotte, Oklahoma, a water level of 750 feet by the dam gauge meant a water level of about 752 feet at Wyandotte (R. 123, 124), but Petitioner made no effort to acquire the land necessary to carry this pile-up of water (R. 44).

Article 13 of the License granted Petitioner by the Federal Power Commission, permits the Petitioner to use the waters of the lake up to elevation 745 feet for production of power, reserves the storage space between the 745 foot and the 755 foot levels for flood control, but provides* * * "*the Licensee shall not be required to impound*

any water above elevation 750 *feet until the United States has acquired the necessary flowage rights above that elevation"* (R. 37). The parties stipulated that neither Petitioner nor the United States had ever acquired flowage rights above the 750 foot level (R. 44).

In the months of October and November, 1941, heavy rains caused a considerable volume of flood water to flow down the Neosho and Spring rivers into Petitioner's lake. When the dam gauge showed the water elevation of the lake had risen above the 745 foot level, W. C. Burnham, the Petitioner's hydraulic engineer notified the War Department's engineers at Tulsa, Oklahoma, and thereafter Burnham regulated the water level of the lake by the opening and/or closing of the gates of the dam, as directed by the engineers of the War Department (R. 100, 111). On October 30, 1941, Burnham received the following order by wire (R. 109):

> You are hereby directed to open one main spillway gate immediately. Seven main spillway gates and one small spillway gate will be kept open until further instructions are received. If the reservoir reaches elevation 749.7 spillway gates will be opened so that the outflow will approximately balance the inflow. *Under no circumstances will the pool level be allowed to rise above elevation* 750.0 *on the dam gate.*
>
> Montgomery.

When Burnham received this order he called the Engineer's office and told them that an elevation of 749.7 feet of water by the dam gauge meant an elevation of about 752 feet at Wyandotte, Oklahoma (R. 123), but he was directed to proceed according to the order, nevertheless, *as the engineers for the War Department had the right to and no doubt did assume that Petitioner had acquired*

enough land for its lake bed so that a water level of 750 feet by the dam gauge could be carried.

Burnham permitted the waters of the lake to build up to the 749.7 foot level by the dam gauge, and because of the pile up and backwater curve, the lake level at Wyandotte reached 752 feet, *or some two feet above the elevation to which the Petitioner had acquired land for its lake bed,* forcing the back water of the lake on Respondent's school grounds about 50 feet beyond the 750 foot contour line (R. 48, 55) and so close to the gymnasium building that the lake water infiltrated through the gravel soil the short distance remaining into the Gymnasium where it stood about 4 inches deep on the oak floor of the Gymnasium proper, about 10 to 12 inches deep in the side and dressing rooms (R. 49) and filled the deep water well full of muddy water. The finish on the oak floor of the gymnasium was ruined, the floor buckled in several places (R. 64) as much as a foot (R. 65), athletic equipment and musical instruments were damaged (R. 66, 67), the water in the deep water well could not be used for drinking purposes (R. 70), trash and debris of all kinds was piled up on the school grounds causing noxious odors (R. 74), and it was necessary to dismiss school during the period of both overflows (R. 74). For these injuries the trial court rendered and the Oklahoma Supreme Court affirmed a judgment of $902.65 (R. 90).

The Town of Wyandotte is located at the confluence of the Neosho and Spring rivers where the Grand river begins. When flood waters flow down the Neosho and Spring rivers and strike the stationary water of the lake at this point of confluence, the stationary water of the lake is almost as effective a dam as stone and concrete and causes a pile-up of water, raises the water level at

that point some two or three feet higher than further down the lake, and forces the backwater over the immediately surrounding territory. *This natural phenomena was well known to W. C. Burnham, the Petitioner's hydraulic engineer* (R. 123), and is commented on by the Federal Power Commission in its letter to Petitioner, which letter was introduced in evidence by the Petitioner itself, in these words (R. 100):

> "It is a known fact that backwater effects result from the impounding of waters and *failure to take such effects into consideration in acquiring sufficient lands cannot create a liability against the United States.* Articles 12 and 13 of the License confirm this interpretation."

Now if the term—"*750 foot level*"—as that term is used in the License, means the water level of the lake, *as fixed by the gauge at the dam,* as the Federal Power Commission held and as Petitioner now contends, then Petitioner was negligent and failed to comply with the terms of its license in that it should have taken these well known backwater effects into consideration in acquiring land for its lake bed and should have acquired land to the 752 or 753 foot elevation in the vicinity of Wyandotte so as to carry a water elevation of 750 feet at the dam gauge.

On the other hand, if the term—"*750 foot level*"—as that term is used in the license, means the water level of the lake at all points thereon, then, in view of the admitted fact that neither Petitioner nor the United States had acquired land in the vicinity of Wyandotte for the lake bed above the 750 foot elevation (R. 44), the order of the War Department's engineer was beyond his jurisdiction and authority and the Petitioner should have refused to abide by such an order when it knew that a water

level of 749.7 feet at the dam meant a water level of 752 to 753 feet at Wyandotte, and it further knew that Article 13 of the License in part provides (R. 37):

> "The Licensee shall impound flood waters in the storage space between elevations 745 and 755, and release flood waters therefrom, when, as and in the manner directed by the Secretary of War, or his authorized representative; *provided, that the Licensee shall not be required to impound any water above elevation* 750 *until the United States has acquired the necessary flowage rights above that elevation.*"

Petitioner failed to acquire sufficient land for its lake bed so as to permit a lake water level of 750 feet by the dam gauge, as is specifically required by the License granted to it by the Federal Power Commission. When that failure was the proximate cause of the damage and injury as in the case at bar, then it cannot successfully claim protection of immunities given the United States, for the United States was acting within its legal rights when it ordered the water level built up to 749.7, but the Petitioner was certainly exceeding its authority when it flooded lands above the 750 foot level which it did not own and which it should have acquired, by the very provisions of its license. The rule here contended for is quite well stated in one of the decisions cited by Petitioner in its brief, *i. e., Yearsley* v. *W. A. Ross Construction Co.*, 309 U. S. 18, 60 Sup. Ct. Rep. 413, 414, as follows:

> "Where an agent or officer of the Government purporting to act on its behalf has been held to be liable for his conduct causing injury to another, the ground of liability has been found to be either that he exceeded his authority or that it was not validly conferred. *Philadelphia Company* v. *Stimson*, 223 U. S. 605, 619, 620, 32 S. Ct. 340, 344, 56 L. Ed. 570. See *United States* v. *Lee*, 106 U. S. 196, 220, 221, 1 S. Ct.

240, 260, 261, 27 L. Ed. 171; *Noble* v. *Union River Logging R. R. Co.*, 47 U. S. 165, 171, 172, 13 S. Ct. 271, 272, 273, 37 L. Ed. 123; *Tindal* v. *Wesley*, 167 U. S. 204, 222, 17 S. Ct. 770, 777, 42 L. Ed. 137; *Scranton* v. *Wheeler*, 179 U. S. 141, 152, 21 S. Ct. 48, 52, 45 L. Ed. 126; *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94, 108, 110, 23 S. Ct. 33, 38, 39, 47 L. Ed. 90."

In the body of the opinion in the case of *Philadelphia Company* v. *Stimson*, 223 U. S. 605, 32 Sup. Ct. Rep. 340, 344, this Honorable Court plainly laid down this rule of law:

> "The exemption of the United States from suit does not protect its officers from personal liability to persons whose rights of property they have wrongfully invaded. *Little* v. *Barreme*, 2 Cranch 170, 2 L. Ed. 243; *United States* v. *Lee*, 106 U. S. 196, 220, 221, 27 L. Ed. 171, 181, 182, 1 Sup. Ct. Rep. 240; *Belknap* v. *Schild*, 161 U. S. 10, 18, 40 L. Ed. 599, 601, 16 Sup. Ct. Rep. 443; *Tindal* v. *Wesley*, 167 U. S. 204, 42 L. Ed. 137, 17 Sup. Ct. Rep. 170; *Scranton* v. *Wheeler*, 179 U. S. 141, 152, 45 L. Ed. 126, 133, 21 Sup. Ct. Rep. 48."

The rule is also stated as follows:

> "The exemption of the United States from judicial process does not protect its officers and agents, civil or military, in time of peace, from being personally liable to an action of tort by a private person whose rights of property they have wrongfully invaded or injured, even by authority of the United States. Such officers or agents, although acting under order of the United States, are therefore personally liable to be sued."
>
> *Belknap* v. *Schild*, 161 U. S. 10, 16 Sup. Ct. Rep. 443, 40 U. S. (L. Ed.) 599.
>
> *Bates* v. *Clark*, 95 U. S. 204, 24 U. S. (L. Ed.) 471.

Cammeyer v. *Newton*, 94 U. S. 225, 235, 24 U. S. (L. Ed.) 72.

Campbell v. *James*, 17 Blatchf. 42, 4 B. & A. Pat. Cas. 456, 4 Fed. Pat. Cas. No. 2361.

Campbell v. *James*, 18 Blatchf. 92, 2 Fed. 338.

Head v. *Porter*, 48 Fed. 481.

In the case of *State Highway Commission* v. *Younger*, 170 Okla. 614, 41 Pac. 2d 686, the Oklahoma Supreme Court has followed the rule laid down by this Honorable Court. In the body of the opinion in that case the Court held:

> "The rule defining the distinction between an action against the State and an action against State officers was laid down and applied by this court in the following cases: *Wentz* v. *Ingenthron*, 146 Okla. 165, 294 Pac. 154; *Wentz* v. *Board of Comr's*, 147 Okla. 173, 295 Pac. 599; *Wentz* v. *Dawson*, 149 Okla. 94, 299 Pac. 493; and *Hawks* v. *Seay*, 150 Okla. 160, 1 Pac. 2d 148; and it is stated as follows:
>
> When officers of the state act under invalid authority, or exceed or abuse their lawful authority, and thereby invade private rights that are secured by the Constitution, an action to redress injuries caused by the unauthorized act is not a suit against the State, since the acts of officials not legally authorized, or that exceed or abuse authority of discretion conferred upon them, are no acts of the State."

If the term—"*750 foot level*"—as that term is used in the License, means a 750 foot elevation at all points on and abutting on the lake, and the Petitioner knew that a water level of 749.7 feet by the dam gauge meant a water level of 752 to 753 feet at Wyandotte, Oklahoma, then the War Department's engineer acted in excess of his power, right and authority in directing a water level of 749.7 feet at the dam, and the Petitioner should not have followed such

direction in the face of the proviso in Article 13 of the License, which provides (R. 37):

> *"provided, that the Licensee shall not be required to impound any water above elevation* 750 *until the United States has acquired the necessary flowage rights above that elevation."*

It was admitted by all parties that the United States had not acquired flowage rights above the 750 foot elevation (R. 44). The power of the Divisional Engineers of the War Department was founded on the provisions of the License, and their acts and orders must find a basis in law. In the case of *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94, 23 Sup. Ct. Rep. 33, 38, this Honorable Court said:

> "That the conduct of the Postoffice is a part of the administrative department of the Government is entirely true, but that does not necessarily and always oust the courts of jurisdiction to grant relief to a party aggrieved by any action by the head, or one of the subordinate officials, of the Department, which is unauthorized by the Statute under which he assumes to act. *The acts of all its officers must be justified by some law, and in case the officials violate the law to the injury of an individual the courts generally have jurisdiction to grant relief."*

This is not an action where the Petitioner confined the waters of its lake within proper bounds and natural seepage or percolation of the lake water caused the injury. *It is a case where Petitioner purposely permitted the water level of its lake to build up to such a point that the lake water got 50 feet or more beyond the lake bed and trespassed on the Respondent's lands, coming in such close proximity to the buildings as to partially fill them with water, which would not have occurred but for the tres-*

pass. It is a case where the petitioner clearly exceeded its lawful authority and in so doing invaded private rights, for even Petitioner itself does not seek to justify its action in trespassing on Respondent's property with two feet of water, it simply asks immunity from an action in damages on the theory that it was functioning as an agency of the United States Government. An examination of the decisions cited by Petitioner, in every instance indicates that the Agency of the United States Government *was acting according to law or within the bounds of a contract with the Government.* Let us take for illustration the case upon which petitioner places so much reliance, towit, *Chattanooga & Tennessee River Power Co.* v. *Lawson,* (Tenn.) 201 S. W. 165, the second syllabus is:

> "A private contractor, building a dam to be deeded to the United States in a navigable stream *under direction and according to specifications of the United States,* is liable only to the same extent as the Government, which is not liable for the consequential damages to the tenant at will of one who has been compensated for land taken, by alternate overflow and recession of water, causing stagnation and breeding mosquitoes which infected plaintiff and his family with malaria."

At pages 168, 169, of the opinion the court said:

> "The plaintiff in error was guilty of no negligence, having performed the work strictly in accord with the specifications furnished to it by its employer."

At page 170 of the opinion it is said:

> "It is equally preposterous to say that the servants of the Government, in executing, *without negligence,* the orders of the Government, would be responsible to third parties on the ground that the Gov-

ernment works would make the neighborhood unhealthy."

The courts appear to be agreed on the proposition that if an agency of the United States was acting according to law or within the bounds of a contract with the United States, the agency enjoys the same immunity from suit in damages as does the United States. But such is not the situation at bar by any means. The uncontroverted and admitted facts are that the Petitioner trespassed on the Respondent's property with two feet of backwater and inflicted injury to its property, that Petitioner had not complied with the provisions of the License granted it by the Federal Power Commission requiring it to acquire adequate land for a lake water level of 750 feet by the dam gauge, and its failure to comply with the terms of the License was the proximate cause of the injury and damage to Respondent.

The engineers of the War Department certainly had the right to assume that the Petitioner had acquired sufficient land for its lake bed to permit the lake water level to be built up to the 750 foot level by the dam gauge, because the License required the Petitioner to acquire such lands. When these engineers directed the Petitioner to permit the lake water level to raise to the 749.7 foot level, they made no mistake, as is argued by Petitioner at pages 14, 15 and 23 to 28, inclusive, because the License contemplates their right to control the waters between the 745 and 750 foot levels. The sole mistake that was made was when Petitioner failed to comply with the requirements of the License and acquire the necessary land to carry a lake water level of 750 feet by the dam gauge.

Therefore the record shows that the primary dispute in the case decided by the State Courts did not involve any question as to the validity or existence of the im-

munity claimed, but was a dispute of facts upon which the authority was exercised and the immunity claimed, under which circumstances this Honorable Court has uniformly refused to assume jurisdiction (See decisions first herein cited).

V.

CONCLUSION.

In view of the state of the record as above indicated, the remaining propositions advanced and argued by Petitioner address themselves to hypothetical rather than actual questions. We therefore ask this Honorable Court for its order denying the petition herein.

Respectfully submitted,

FRANK NESBITT,
NELLE NESBITT,
Miami, Oklahoma,
Attorneys for Respondent.